

IC 23-19-5

Chapter 5. Fraud and Liabilities

Effective 7-1-2008.

IC 23-19-5-1

Fraudulent or deceitful acts

Effective 7-1-2008.

Sec. 1. It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) to employ a device, scheme, or artifice to defraud;
- (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-2

Unlawful practices; investment advisers and investment adviser representatives; investment advisory contract

Effective 7-1-2008.

Sec. 2. (a) It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities, or that receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice:

- (1) to employ a device, scheme, or artifice to defraud another person; or
- (2) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

(b) A rule adopted under this article may define an act, practice, or course of business of an investment adviser or an investment adviser representative, other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive, or manipulative, and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, other than supervised persons of a federal covered investment adviser, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive, or manipulative.

(c) A rule adopted under this article may specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-3

Evidentiary burden

Effective 7-1-2008.

Sec. 3. (a) In a civil action or administrative proceeding under this article, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.

(b) In a criminal proceeding under this article, a person claiming an exemption, exception, preemption, or exclusion has the burden of going forward with evidence of the claim.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-4

Sales and advertising literature filing

Effective 7-1-2008.

Sec. 4. (a) Except as otherwise provided in subsection (b), a rule adopted or order issued under this article may require the filing of a prospectus, a pamphlet, a circular, a form letter, an advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this article.

(b) This section does not apply to sales and advertising literature specified in subsection (a) that relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by IC 23-19-2-1, IC 23-19-2-2, or IC 23-19-2-3 except as required under IC 23-19-2-1(7).

As added by P.L.27-2007, SEC.23.

IC 23-19-5-5

Filing false or misleading statements

Effective 7-1-2008.

Sec. 5. It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this article, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-6

Filings related to fact of registration; unlawful act

Effective 7-1-2008.

Sec. 6. The filing of an application for registration, a registration statement, a notice filing under this article, the registration of a person, the notice filing by a person, or the registration of a security under this article does not constitute a finding by the commissioner that a record filed under this article is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a

transaction does not mean that the commissioner has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction. It is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective purchaser, customer, or client a representation inconsistent with this section.
As added by P.L.27-2007, SEC.23.

IC 23-19-5-7

Qualified immunity

Effective 7-1-2008.

Sec. 7. A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the commissioner or designee of the commissioner, the Securities and Exchange Commission, or a self-regulatory organization, unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-8

Violations; felony; assistance in prosecution

Effective 7-1-2008.

Sec. 8. (a) A person who knowingly violates this article, or a rule adopted under this article, except section 4 of this chapter or the notice filing requirements of IC 23-19-3-2 or IC 23-19-4-5, commits a Class C felony.

(b) It is the duty of a prosecuting attorney, as well as of the attorney general, to assist the commissioner upon the commissioner's request in the prosecution to final judgment of a violation of the penal provisions of this article. If the commissioner determines that an action based on the securities division's investigations is meritorious:

- (1) the commissioner or a designee empowered by the commissioner shall refer the facts drawn from the investigation to the prosecuting attorney of the judicial circuit in which the crime may have been committed;
- (2) the commissioner and the securities division shall assist the prosecuting attorney in prosecuting an action under this section, which may include a securities division attorney serving as a special deputy prosecutor appointed by the prosecuting attorney;
- (3) a prosecuting attorney to whom facts concerning fraud are referred under subdivision (1) may refer the matter to the attorney general;
- (4) if a matter has been referred to the attorney general under subdivision (3), the attorney general may:

- (A) file an information in a court with jurisdiction over the matter in the county in which the offense is alleged to have been committed; and
 - (B) prosecute the alleged offense; and
 - (5) if a matter has been referred to the attorney general under subdivision (3), the commissioner and the securities division shall assist the attorney general in prosecuting an action under this section, which may include a securities division attorney serving as a special deputy attorney general appointed by the attorney general.
- (c) This article does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-9

Civil liability; defense; rights and remedies; joint and several liability; right of contribution; statute of limitations; contractual waivers void

Effective 7-1-2008.

Sec. 9. (a) A person is liable to the purchaser if the person sells a security in violation of this article, including a violation of IC 23-19-4-12(d)(9) or IC 23-19-4-12(d)(13). It is a defense if the person selling the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the violation or the purchaser knowingly participated in the violation. An action under this subsection is governed by the following:

- (1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the purchase, costs, and reasonable attorney's fees determined by the court or arbitrator, upon the tender of the security, or for actual damages as provided in subdivision (3).
 - (2) The tender referred to in subdivision (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in subdivision (3).
 - (3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the purchase, costs, and reasonable attorneys' fees determined by the court or arbitrator.
- (b) A person is liable to the seller if the person buys a security in

violation of this article, including a violation of IC 23-19-4-12(d)(9) or IC 23-19-4-12(d)(13). It is a defense if the person purchasing the security sustains the burden of proof that either the person did not know, and in the exercise of reasonable care could not have known, of the conduct constituting the violation or the seller knowingly participated in the violation. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security, and any income received on the security, costs, and reasonable attorney's fees determined by the court or arbitrator, upon the tender of the purchase price, or for actual damages as provided in subdivision (3).

(2) The tender referred to in subdivision (1) may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in subdivision (3).

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability, and interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the sale of the security, costs, and reasonable attorney's fees determined by the court or arbitrator.

(c) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of this article is liable to the client. An action under this subsection shall be governed by the following:

(1) For a violation of section 1 or 2 of this chapter, the client may maintain an action to recover the consideration paid for the advice and the amount of any actual damages caused by the fraudulent conduct, interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of the fraudulent conduct, costs, and reasonable attorney's fees determined by the court less the amount of any income received as a result of the fraudulent conduct.

(2) For a violation of any other section of this article, the client may maintain an action to recover the consideration paid for the advice, interest at the greater of eight percent (8%) per annum or the rate provided for in the security from the date of payment, costs, and reasonable attorney's fees determined by the court or arbitrator.

(3) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(d) The following persons are liable jointly and severally with and

to the same extent as persons liable under subsections (a) through (c):

(1) A person that directly or indirectly controls a person liable under subsections (a) and (b), unless the controlling person sustains the burden of proof that the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which the liability is alleged to exist.

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (a) through (c), including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.

(3) An individual who is an employee of or associated with a person liable under subsections (a) through (c) and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist.

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (a) through (c), unless the person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(e) A person liable under this section has a right of contribution as in cases of contract against any other person liable under this section for the same conduct.

(f) A cause of action under this section survives the death of an individual who might have been a plaintiff or defendant.

(g) Action under this section shall be commenced within three (3) years after discovery by the person bringing the action of a violation of this article, and not afterwards.

(h) A person that has made, or has engaged in the performance of, a contract in violation of this article or a rule adopted or order issued under this article, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this article, may not base an action on the contract.

(i) A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this article or a rule adopted or order issued under this article is void.

(j) The rights and remedies provided by this article are in addition to any other rights or remedies that may exist.

As added by P.L.27-2007, SEC.23.

IC 23-19-5-10

Rescission offers

Effective 7-1-2008.

Sec. 10. A purchaser, seller, or recipient of investment advice may not maintain an action under section 9 of this chapter if:

(1) the purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(A) an offer stating the respect in which liability under section 9 of this chapter may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer, and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this article to be furnished to that person at the time of the purchase, sale, or investment advice;

(B) if the basis for relief under this section may have been a violation described in section 9(a) of this chapter, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, and interest at the rate of eight percent (8%) per annum from the date of the purchase, less the amount of any income received on the security, or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest at the rate of eight percent (8%) per annum from the date of the purchase in cash equal to the damages computed in the manner provided in this clause;

(C) if the basis for relief under this section may have been a violation described in section 9(b) of this chapter, an offer to tender the security, on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser and interest from the date of the sale, or if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability, and interest at the rate of eight percent (8%) per annum from the date of the sale; or

(D) if the basis for relief under this section may have been a violation described in section 9(c) of this chapter, an offer to reimburse in cash the consideration paid for the advice and interest from the date of payment;

(2) the offer under subdivision (1) states that it must be accepted by the purchaser, seller, or recipient of investment advice within thirty (30) days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any

shorter period, of not less than three (3) days, that the commissioner, by order, specifies;

(3) the offeror has the present ability to pay the amount offered or to tender the security under subdivision (1);

(4) the offer under subdivision (1) is delivered to the purchaser, seller, or recipient of investment advice, or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and

(5) the purchaser, seller, or recipient of investment advice that accepts the offer under subdivision (1) in a record within the period specified under subdivision (2) is paid in accordance with the terms of the offer.

As added by P.L.27-2007, SEC.23.